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the plaintiff from bringing a properly framed suit for redemption. We accordingly allow this appeal, and, setting aside the decree of the Court below, dismiss the plaintiff's suit. Having regard to the circumstances of the case and the conduct of the parties we direct that they abide their own cost in all Courts.

Appeal decreed.

APPELLATE CIVIL.

1908
January 2.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

AJUDHIA AND OTHERS (DEFENDANTS) *v.* KUNJAL (PLAINTIFF) AND GAURI SHANKAR AND ANOTHER (DEFENDANTS).*

Bond—Instalments—Power to sue for whole amount on default of payment—Limitation—Act No. XV of 1877 *(Indian Limitation Act), schedule II, article* 75.

A bond payable by instalments contained a provision that in default of the payment of any one instalment it would be in the power of the creditor to sue for the whole amount due under the bond without waiting for the period provided for the payment of other instalments. *Held* that this provision did not mean that the creditor should be compelled to sue for the whole on default of payment of one instalment, nor did limitation in respect of the whole debt commence to run from the date of the first default. *Jadab Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty* (1) and *Hurri Pershad Chowdhry* v. *Nasib Singh* (2) dissented from. *Shankar Prasad* v. *Jalpa Prasad* (3) and *Maharaja of Benares* v. *Nand Ram* (4) referred to.

THE facts of this case are as follows :—

On the 3rd of August 1891 one Debia, the father of some of the defendants, executed a bond payable by instalments of Rs. 50 annually in the month of Jeth in favour of Kashi Prasad. In May 1905 Kashi Prasad's representatives sold this bond to the plaintiff Kunjal. On the 21st of June 1905 Kunjal sued, making the representatives of the original obligor and obligees parties, to recover three instalments under the bond. The bond contained a provision that, in default of payment of any one instalment, it would be within the power of the creditor (*mahajan mazkurko ikhtyar hoga*) to sue for the whole amount due under the bond

* Second Appeal No. 489 of 1906, from a decree of Bepin Behari Mukerji, Judge of the Court of Small Causes exercising powers of a Subordinate Judge of Cawnpore, dated the 30th of April 1906, modifying a decree of Muhammad Azimuddin, Munsif of Fatehpur, dated the 18th of September 1905.

(1) (1904) I. L. R., 31 Calc., 297.
(2) (1894) I. L. R., 21 Calc., 542.
(3) (1894) I. L. R., 16 All., 371.
(4) (1907) I. L. R., 29 All., 431.

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without waiting for the period provided for the payment of other instalments. The Court of first instance (Munsif of Fatehpur) held that the effect of this provision was to compel the creditor to sue on default for recovery of the whole debt, and that the suit was barred by limitation, and accordingly dismissed it. On appeal, however, this decision was reversed and a decree given to the plaintiff against the sons of the obligor. The judgment-debtors appealed to the High Court.

Mr. *Muhammad Ishaq Khan*, for the appellants.

Maulvi *Muhammad Ishaq*, for the respondents.

KNOX and AIKMAN, JJ.—On the 3rd of August 1891 the father of the first four defendants executed a bond payable by instalments in favour of one Kashi Prasad, father of the remaining defendants. The bond contained a provision that in default of the payment of any one instalment it would be within the power of the creditor (*mahajan mazkurko ikhtyar hoga*) to sue for the whole amount due under the bond without waiting for the period provided for the payment of other instalments. The present suit is for the recovery of three instalments due under the bond. The Munsif held that the suit was barred by the provisions of article 75 of schedule II to the Indian Limitation Act, and dismissed the suit. The suit, we may here observe, was not for the enforcement of the option given by the bond, whereby the creditor could claim the whole amount unpaid. The plaintiff appealed. The learned Subordinate Judge in a very able judgment held that the claim was not barred. The defendants come here in second appeal and again contend that the plaintiff's cause of action arose upon the default made in the payment of the first instalment, and that the suit is therefore barred by limitation. There might have been some force in this contention if the suit had been to enforce the penalty and to recover the whole amount left unpaid by the bond. But the suit was only for the instalments unpaid at the time of the suit. In support of his argument the learned counsel referred us to decisions of the Calcutta High Court, namely, *Jadab Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty* (1) and to the case upon which that decision is based, *viz.*, *Hurri Pershad Chowdhry* v. *Nasib Singh* (2).

(1) (1904) I. L. R., 31 Calc., 297. (2) (1894) I. L. R., 21 Calc., 542.

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The latter case has been expressly dissented from in Letters Patent, Appeal No. 81 of 1893, decided on the 10th of June 1894 in which the learned Judges held that the true rule of construction in cases of decrees for payment by instalments is to be found in the decision of this Court in *Shankar Prasad* v. *Jalpa Prasad* (1). These rulings are distinctly against the appellants here. We may also refer to what was said in *Maharaja of Benares* v. *Nand Ram* (2). We agree with the remarks of the learned Judges who held in the last-mentioned case that it would be very unfortunate if the view contended for by the appellant is sustained, as it would be to punish the creditor for forbearance shown to his debtor and compel him to press his demands at the earliest opportunity. It is conceivable that a bond might be so worded as to compel a creditor to sue for the whole amount immediately if any default occurred. The bond with which we have to deal is not so worded. It merely gives the creditor an option. We follow the law as laid down by this Court, and, with all deference to the learned Judges of the Calcutta High Court who have taken the opposite view, we are unable to agree with them. This disposes of the first ground of appeal. The only other ground was not argued. We dismiss the appeal with costs.

Appeal dismissed.

1908

January 4.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

BAIJNATH SINGH (PLAINTIFF) *v.* PALTU AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 *(Transfer of Property Act), section* 54*—Sale—Non-payment of consideration—Sale nevertheless complete.*

In a sale of immovable property non-payment of the purchase-money does not prevent the passing of the ownership of the purchased property from the vendor to the purchaser, and the purchaser can, notwithstanding such non-payment, maintain a suit for possession of the property. *Shib Lal* v. *Bhagwan Das* (3), *Umedmal Motiram* v. *Davu bin Dhondiba* (4) and *Sagaji* v. *Namdev* (5) followed.

IN this case the defendants sold to the plaintiff by a registered sale-deed dated the 6th of May 1898 a 4-pie share in certain

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* Second Appeal No. 1007 of 1906, from a decree of L. Marshall, District Judge of Banda, dated the 21st of August 1906, confirming a decree of Hamid Hasan, Munsif of Hamirpur, dated the 16th of May 1906.

(1) (1894) I. L. R., 16 All., 371.
(2) (1907) I. L. R., 29 All., 431.
(3) (1888) I. L. R., 11 All., 244.
(4) (1878) I. L. R., 2 Bom., 547.
(5) (1899) I. L. R., 23 Bom., 525.

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zamindari property. According to the sale-deed the consideration was agreed to be paid as follows, namely, Rs. 100 to be credited in part payment of past debts, Rs. 20 to be paid in cash, and the balance, Rs. 80, to be paid to a mortgagee of the property. Possession of the property sold not having been obtained, the purchaser sued for recovery of possession, alleging that the consideration for the sale had been paid in full. The Court of first instance (Munsif of Hamirpur) found that no portion of the consideration had in fact been paid and upon that ground dismissed the suit, and this decision was upheld on appeal by the District Judge. The plaintiff appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Babu *Jogindro Nath Mukerji*, for the respondents.

STANLEY, C.J, and BANERJI, J.—This is a second appeal against a decree of the lower appellate Court dismissing the plaintiff's suit for recovery of possession of a 4-pie share in a village. This share was conveyed to the plaintiff by a sale deed of the 6th of May 1898, which was duly registered. Possession was not obtained, and the present suit was therefore brought. In his plaint the plaintiff alleged that the full consideration for the sale, namely, Rs. 200 had been satisfied. In their defence the defendants alleged that the consideration had not been paid, and it is found by both the lower Courts that this was so. In consequence of the finding that no portion of the consideration had been paid, the learned District Judge held that there was in fact no sale of the property. He observes in the course of his judgment:—"Thus not any portion of the consideration has been paid. Non-payment of the 'promised' portion would not invalidate the 'sale,' and the lower Court has recognised this principle. But when the consideration is supposed to be 'part paid and part promised' and not even the 'part paid' amount has actually been paid, the provisions of section 54 (of the Transfer of Property Act) have not been fulfilled and the transaction cannot be called a sale at all." We are unable to agree with the learned District Judge as to this. According to the sale deed the consideration was agreed to be paid as follows:—Rs. 100 to be credited in part payment of past debts, Rs. 20 to be paid in cash, and Rs. 80 the balance to be paid to a mortgagee of

the property. Now we must take it on the findings that no portion of the purchase money has been paid or satisfied. The vendee did not fulfil his obligation to pay it. It has been held, and we think rightly, that the non-payment of the purchase money does not prevent the passing of the ownership of purchased property from the vendor to the purchaser, and that the purchaser, notwithstanding such non-payment, can maintain a suit for possession of the property—see *Shib Lal* v. *Bhagwan Das* (1). It was so held in the case of *Umedmal Motiram* v. *Davu bin Dhondiba* (2) and again in the case of *Sagaji* v. *Namdev* (3), in which the evidence showed that there was a *bonâ fide* sale of property by the defendant to the plaintiffs, and it was held that this sale was a completed transaction, notwithstanding the fact that no portion of the consideration had been paid, and that the only remedy of the vendor for the consideration was a suit for recovery of the amount of it. We think therefore that the Courts below were wrong in dismissing the plaintiff's claim. In the case of *Shib Lal* v. *Bhagwan Das*, to which we have referred, it was laid down by Mahmood, J., rightly, we think, that equities may exist in favour of a defendant to a suit like the present one so as to subject the decree to restrictions and conditions appropriate to the circumstances of the case. Here there is such an equity arising out of the non-payment of the purchase money by the plaintiff, and regard ought to be paid to it in any decision which the Court may pass.

Accordingly we allow the appeal. We set aside the decrees of both the lower Courts, and we order and direct that if within six months from this date, the plaintiff pay to the defendants the sum of Rs. 200, the amount of the purchase money, the property mentioned in the plaint be delivered to him, but in default of such payment the plaintiff shall forfeit his right to recover the property. If the plaintiff do not pay the purchase money within the time aforesaid, his suit will stand dismissed with costs in all Courts. If he, however, do pay the purchase money within such period, then in view of the fact that the plaintiff alleged in his plaint that he had paid the entire of the purchase money, contrary

(1) (1888) I. L. R., 11 All., 244. (2) (1878) I. L. R., 2 Bom., 547.
(3) (1899) I. L. R., 23 Bom., 525.

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to the fact, we think that both parties should abide their own costs in the Courts below and we order accordingly. As to the costs of this appeal, the plaintiff, we think, if he pay the purchase money, is entitled to them, and we so order.

Appeal decreed.

1908
January 4.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

BHURA (PLAINTIFF) *v.* SHAHAB-UD-DIN (DEFENDANT).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 22*—Occupancy holding—Succession.*

Under the Agra Tenancy Act of 1901 the personal law of the parties concerned is no longer applicable to the case of succession to an occupancy holding, but the holding descends to all the male lineal descendants in the male line of descent of the last owner, without exclusion by the nearer of the more remote.

THE facts of this case are as follows. One Kallu had an occupancy holding. He also had three sons, Bhura, Nathu and Khuda Bakhsh. The two latter died in Kallu's life-time. In August 1904, after the death of Kallu, Bhura obtained from the Revenue Court a decree ejecting the sons of Nathu from a portion of the occupancy holding. The Court in that suit found that under section 22 of the Agra Tenancy Act, 1901, the nearer descendant excluded the more remote. The present suit was brought to eject Shahab-ud-din, the son of Khuda Bakhsh. This suit was brought in the Court of the Subordinate Judge of Dehra Dun, and was dismissed on the preliminary question of want of title in the plaintiff. The plaintiff appealed to the District Judge of Saharanpur, who agreed with the Court below. The plaintiff thereupon appealed to the High Court.

Pandit *Mohan Lal Nehru*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondent.

STANLEY, C.J., and BURKITT, J.—In our opinion the decision of the learned District Judge affirming the decision of the Subordinate Judge is correct. The question is as to the interpretation to be put on the first clause of section 22 of the Agra Tenancy Act, II of 1901. That clause in the matter of the succession

* Second Appeal No. 408 of 1906 from a decree of L. G. Evans, District Judge of Saharanpur, dated the 15th of March 1906, confirming a decree of S. P. O'Donnell, Subordinate Judge of Dehra Dun, dated the 9th of November 1905.

(*inter alia*) to an occupancy tenant provides that on the death of the tenant his interest in the holding shall devolve on his male lineal descendants in the male line of descent. The appellant and the respondent to this appeal are both male lineal descendants of the last tenant in the male line of descent. The appellant is his son, while the respondent is his grandson. As the respondent's father predeceased his father, the last tenant, the respondent would be excluded under the Rent Act of 1881, section 9, which by the words "as if it were land" made the personal law of the party applicable to the descent of an occupancy holding. The appellant therefore desires us to read into section 22 of the Act now in force, such words as would make the tenure descend as if it were land, thus excluding the respondent. As a reason for his contention his learned vakil pointed out that some unexpected results might follow from a literal interpretation of section 22. For instance, in the case of the death of a tenant leaving several sons, grandsons and even great-grandsons, he argues that under the words of section 22 the tenure might be held to devolve simultaneously on all.

As to that matter we do not consider it necessary to express any opinion now. There can be no doubt that the new Tenancy Act has completely altered the rule of devolution in the case of a tenancy such as that in question here. The tenancy no longer devolves "as if it were land," but on the lineal male descendants of the last tenant. The Legislature has chosen to alter the law, and we can see no reason why we should not assume that the new provision was deliberate and intentional. The parties here are Muhammadans, whose personal law gives a share in the estate of a deceased Muhammadan to daughters, wives, sisters and other females, who are excluded by the words "male lineal descendants" in section 22 of the new Act. If we apply the Muhammadan law for the purpose of excluding the respondent, it is difficult to see why we should not apply it to include females, whom the first clause of section 22 excludes when there are "lineal male descendants." We dismiss this appeal with costs.

Appeal dismissed.

1908
January 4.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

TEJPAL (PLAINTIFF) *v.* GIRDHARI LAL (DEFENDANT).*

Pre-emption—Mortgage—Property purchased by vendees subject to an unregistered mortgage—Pre-emptor bound to take the property subject to the mortgage.

Property the subject of a suit for pre-emption was purchased by the vendees subject to an unregistered mortgage for Rs. 99. *Held* that the pre-emptor must take the property subject to this unregistered mortgage irrespective of the question whether he had notice of it or not.

THIS was a suit brought to enforce payment of a sum of Rs. 129-3-0, secured by a mortgage of the 25th of November 1900, by sale, if necessary, of the mortgaged property. The principal amount secured by the mortgage was Rs. 95 and therefore the mortgage was not compulsorily registrable. After the execution of this mortgage, namely, on the 26th of January 1901, the mortgaged property was sold by Bahraich the mortgagor to Bhagwan Singh, Karan Singh and Tota Ram, and the purchase deed in their favour was duly registered. At the date of the sale the purchasers had notice of the unregistered mortgage, and therefore must be taken to have purchased the property subject to it. Subsequently the defendant respondent Girdhari Lal claimed a right to pre-empt this sale, and succeeded in his claim and obtained possession of the property. The plaintiff then brought the present suit, and it was defended by Girdhari Lal on the ground that at the time of pre-emption he had no notice of the plaintiff's mortgage and therefore was not bound by it. The Court of first instance (Munsif of Shikohabad) held that the defendant purchased subject to all the liabilities which attached to the property in the hands of the vendees, and was therefore liable to satisfy the mortgage. On appeal the lower appellate Court (Subordinate Judge of Mainpuri) reversed this decision, holding that the pre-emptor was not affected by the notice of the mortgage which the vendees had; that he had no knowledge of the mortgage when he pre-empted the sale, and that therefore the property in his hands was not liable for the mortgage debt. Against this decree the plaintiff appealed to the High Court.

* Second Appeal No. 608 of 1905, from a decree of A. Rahman, Subordinate Judge of Mainpuri, dated the 11th of April 1905, modifying a decree of Gokul Prasad, Officiating Munsif, Shikohabad, dated the 12th of May 1904.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Pandit *Baldeo Ram Dave*, for the respondent.

STANLEY, C.J., and BURKITT, J.—The suit out of which this appeal has arisen was brought by the plaintiff to enforce payment of a sum of Rs. 129-3-0, secured by a mortgage of the 25th of November 1900, by sale, if necessary, of the mortgaged property. The principal amount secured by the mortgage was Rs. 95 and therefore the mortgage was not compulsorily registrable. After the execution of this mortgage, namely, on the 26th of January 1901, the mortgaged property was sold by Bahraich the mortgagor to Bhagwan Singh, Karan Singh and Tota Ram and the purchase deed in their favour was duly registered. At the date of the sale the purchasers had notice of the unregistered mortgage and therefore must be taken to have purchased the property subject to it. Subsequently the defendant respondent Girdhari Lal claimed a right to pre-empt this sale, and succeeded in his claim and obtained possession of the property. The plaintiff then brought his suit, and it was defended by Girdhari Lal on the ground that at the time of pre-emption he had no notice of the plaintiff's mortgage and therefore was not bound by it. The learned Munsif held that the defendant appellant purchased subject to all the liabilities which attached to the property in the hands of the vendees, and was therefore liable to satisfy the mortgage. On appeal the learned Subordinate Judge reversed this decision, holding that the pre-emptor was not affected by the notice of the mortgage which the vendees had; that he had no knowledge of the mortgage when he pre-empted the sale, and that therefore the property in his hands was not liable for the mortgage debt.

From this decision the appeal now before us was preferred. On behalf of the respondent reliance was placed upon section 50 of the Registration Act, which provides that every document of the kind mentioned in clauses (*a*), (*b*), (*c*) and (*d*) of section 17, which include a deed of sale, shall, if duly registered, take effect as regards the property comprised therein against every unregistered document relating to the same property and not being a decree or order. This section, it has been frequently held, does not protect a purchaser who purchased with knowledge of an

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unregistered incumbrance. Therefore it is clear that the vendees Bhagwan Singh, Tota Ram and Karan Singh were liable to satisfy Tejpal's mortgage. They in fact must be taken to have purchased the property subject to the mortgage.

The question then is, is the pre-emptor Girdhari Lal in any better position than the vendees? We think not, and for this reason: a right of pre-emption is not a right of repurchase, but is simply a right entitling the pre-emptor to be substituted for the vendee as purchaser and to stand in his shoes in respect of all the rights and obligations arising from the sale under which he derived his title. A person who chooses to pre-empt, therefore, must take upon him the burden of the obligations subject to which the sale was made as well as the benefits accruing therefrom. In other words, he can get no more than that for which the vendee bargained. The vendees in this case acquired the property subject to the plaintiff's mortgage, and the pre-emptor if he chose to pre-empt must also take subject to it. The pre-emptive property was not in fact an unincumbered property, but one subject to the plaintiff's mortgage, an incumbrance which the purchasers were liable to satisfy, and which the pre-emptor, who has enforced his right to have his name substituted as purchaser, must, we think, satisfy. The vendees had distinct notice of the incumbrance, and even if they concealed their knowledge of it from the pre-emptor, they cannot thereby give him a better right than that which they themselves possessed. The question may be looked at from another point of view. The consideration for the sale to the vendees was not alone the money actually paid in cash, but also the amount of the mortgage, for the payment of which they became responsible. In holding, therefore, that the pre-emptor is bound to satisfy the mortgage-debt, we simply require him as pre-emptor to pay the entire of the purchase money. It is well settled law in this Court that a pre-emptor must pre-empt the whole of the bargain between vendor and vendee or not at all. He cannot take a portion of it only. Here part of the bargain was that the vendees should accept the liability of the vendor in respect of the plaintiff's mortgage. Therefore the successful pre-emptor took subject to that liability.

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For these reasons we think that the lower appellate Court was wrong in reversing the decision of the learned Munsif. We therefore allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance with costs in all Courts. We extend the time for payment of the mortgage debt up to the 1st of April next.

Appeal decreed

1908

January 9.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

NIRANJAN (PLAINTIFF) *v.* GAJADHAR (DEFENDANT).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 177*—Question of proprietary title—Jurisdiction—Civil and Revenue Courts.*

Held that the question whether a tenant, defendant in a suit for ejectment, is a tenant of one kind or another is not a question of proprietary title within the meaning of section 177 of the Agra Tenancy Act, 1901. *Chhitar Singh* v. *Rup Singh* (1) dissented from.

THE facts of this case are as follows:—

Niranjan Ahir applied as owner of a fixed rate tenant's holding for ejectment of one Gajadhar from a small plot of land. Gajadhar pleaded that he was the fixed rate tenant entitled to the holding. The suit under section 58 of Act No. II of 1901 was tried by an Assistant Collector, who dismissed it. The plaintiff appealed to the Court of the District Judge upon the ground that a question of proprietary title, within the meaning of section 177 (*e*) of the Tenancy Act, had been in issue and was in issue in the appeal. The District Judge, however, being of opinion that no such question was involved, referred the case to the High Court under section 195 of the Tenancy Act in view of the decision in *Chhitar Singh* v. *Rup Singh* (Weekly Notes, 1906, p. 247).

Babu *Parbati Charan Chatterji*, for the respondent.

KNOX and AIKMAN, JJ.—On the facts stated by the learned District Judge of Jaunpur we hold that no question of proprietary title was in issue in the Court of first instance and that no such question is a matter in issue in this appeal. The learned District Judge is right therefore in his view that he had no

*Miscellaneous No. 268 of 1907 on a reference made by W. R. G. Moir, District Judge of Jaunpur, dated the 26th of July 1907, against the order of Rup Narain, Assistant Collector, First Class, of Jaunpur, dated the 27th of November 1906.

(1) Weekly Notes, 1906, p. 247.

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jurisdiction to entertain the appeal. The opposite view may perhaps derive some support from the observations made towards the conclusion of the judgment in *Chhitar Singh* v. *Rup Singh* (1), but, with all deference to the learned Judge who decided the case, we are unable to agree with him in holding that, when there is a question whether one party or the other is the cultivator of specified land, a question of proprietary title arises. This is our answer to the reference.

1908
January 18.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

GANGA DEI (PLAINTIFF) *v.* BADAM AND OTHERS (DEFENDANTS).*

Land holder and tenant—Trees—Land holder's and tenant's rights as to trees on tenant's holding.

Held that as a general rule the property in timber growing on a tenant's holding vests in the zamindar, and the tenant has no right to cut and remove such timber. But as a general rule also the zamindar has no right to interfere with the enjoyment by his tenant of the trees upon his holding so long as the relation of landlord and tenant subsists. *Sheik Abdool Rohoman* v. *Dataram Bashee* (2) referred to.

THE plaintiff in this case sued as zamindar of a village called Kanchanpur praying for a declaration of her title to the trees growing on the cultivated and uncultivated lands of Kanchanpur in the possession of the defendants, who were her tenants, and also for a perpetual injunction prohibiting the defendants from offering any obstruction to the cutting down and removal by her of the trees on their holding. The defendants set up a right by custom to cut the trees in question, but this plea was rejected, and a declaration of title was given to the plaintiff as prayed for in her plaint. The Court of first instance (first Additional Munsif of Meerut) also granted the plaintiff the injunction prayed for, and this decree was upheld in appeal by the lower appellate Court (Additional District Judge of Meerut). The defendants appealed to the High Court, where, the case coming before a Single Judge of the Court, the only question argued was as to the right of the plaintiff to the injunction which she

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* Appeal No. 49 of 1907 under section 10 of the Letters Patent from a judgment of Richards, J., dated the 18th of April 1907.

(1) Weekly Notes, 1906, p. 247. (2) Weekly Reporter, January to July 1864, page 367.

had obtained—*Cf.* Weekly Notes, 1907, p. 150. The result of this appeal was that the decrees of the Courts below were set aside so far as they granted an injunction to the plaintiff restraining the defendants from offering obstruction to the plaintiff in cutting down, removing and selling the trees (other than the trees actually cut). The plaintiff then preferred the present appeal under section 10 of the Letters Patent.

Babu *Durga Charan Banerji*, for the appellant.

Mr. *R. Malcomson* for the respondents.

STANLEY, C.J., and BURKITT, J.—The plaintiff appellant is a zamindar, and as such instituted the suit out of which this appeal has arisen for a declaration of her title to the trees growing on the cultivated and uncultivated land in mauza Kanchanpur in the possession of the defendants, who are her tenants. She also prayed for a perpetual injunction prohibiting the defendants from offering any obstruction to the cutting down and removal by her of the trees on their holdings. The defendants set up a right by custom to cut the trees in question, but this plea was rejected, and a declaration of title was given to the plaintiff appellant as prayed for in her plaint. The two lower Courts also granted to the plaintiff appellant the relief which was claimed by way of injunction; but upon appeal our brother Richards reversed their decrees and allowed an appeal in respect of the injunction. From this decision the present appeal has been preferred under the Letters Patent. We are of opinion that the learned Judge of this Court was perfectly right in the decision at which he arrived. The presumption of law, and the general rule in the absence of custom, is that the property in timber on a tenant's holding vests in the zamindar, and that the tenant has no right to cut and remove such timber. But it appears to us to be clear that in the absence of a custom or of a contract to the contrary a zamindar has no right to interfere with the enjoyment by his tenant of the trees upon his holding as long as the relation of landlord and tenant subsists. A tenant has a right to enjoy all the benefits of the growing timber on his land during his occupancy. If the zamindar desire to have the privilege during a tenancy of entering upon his tenant's holding and cutting down and removing timber he must procure a special stipulation from his tenant in

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that behalf. In the case of *Sheikh Abdool Rohoman* v. *Dataram Bashee* (1) the learned Judges laid down that while a zamindar has a right in the trees which the Court should maintain, the tenant has a right to enjoy all the benefits that the growing timber may afford him during his occupancy, but has no power to cut down the timber and convert it to his own use. We hold therefore that our learned brother was correct in his decision and we accordingly dismiss the appeal with costs.

Appeal dismissed.

1908
January 18.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

SHEORAM TIWARI (DEFENDANT) *v.* THAKUR PRASAD AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, section 578—*Procedure—Irregularity—Disposal of a suit on a Sunday.*

Held that the fact that a suit was decided on a Sunday did not vitiate the decree. *Semble* that the Lord's Day Act (21 Geo. III, Cap. XLIX) does not apply to India. *Param Shook Doss* v. *Rasheed Ood Dowlah* (2) referred to.

THIS was a suit for a declaration of the plaintiffs' ownership of a certain wall and for an injunction against the defendant's interfering with it. The suit was filed in the Court of a Munsif. During the proceedings the Munsif made an inspection of the spot on Sunday, the 18th of June 1905. While he was there the parties came to terms. Thereupon a rubkar was drawn up then and there compromising the case. This was signed by the pleaders on either side, and the Munsif on the same day wrote and signed his judgment. The defendant appealed upon the sole ground that the decree was void, the suit having been decided on a Sunday. The District Judge dismissed the appeal. The defendant then appealed to the High Court, and his appeal coming before a single Judge of the Court was dismissed (*Cf.* Weekly Notes, 1907, p. 168). The present appeal was thereupon preferred by the defendant under section 10 of the Letters Patent.

Babu *Satya Chandra Mukerji*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

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* Appeal No. 51 of 1907 under section 10 of the Letters Patent from a judgment of Griffin, J., dated the 1st of May 1907.

(1) Weekly Reporter, January to July 1864, page 367.

(2) (1874) 7 Mad., H. C., Rep., 285.

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SHEORAM TIWARI v. THAKUR PRASAD.

STANLEY, C.J., and BURKITT, J.—We are of opinion that the proceeding of the Munsif was not vitiated by the fact that it was taken on a Sunday. At the utmost it seems to us that the proceedings may have been irregular, but that any irregularity was cured by the consent of the parties. It is not necessary for us to determine whether the Lord's Day Act applies to this country, but we should be slow to hold that it did, as it would be manifestly inconvenient to do so, the Act being entirely unsuited to the circumstances of the country. We may mention that in the case of *Param Shook Doss* v. *Rasheed Ood Dowlah* (1) it was held that it had no application in this country. We dismiss the appeal with costs.

Appeal dismissed.

1908
January 28.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

MAHADEO PRASAD (OPPOSITE PARTY) *v.* BINDESHRI PRASAD (APPLICANT). *

Act No. VIII of 1890 (*Guardians and Wards Act*)—*Guardian and minor*—*Arbitration*—*Appointment of guardian not to be settled by arbitration.*

The appointment of a guardian to a minor, not being a matter of private right as between parties, is not a question which can be settled by reference to arbitration.

THE facts of this case are as follows:—One Bindeshri Prasad, the managing member of a joint Hindu family governed by the Mitakshara, applied to the District Judge of Allahabad under section 10 of the Guardians and Wards Act (No. VIII of 1890) to be appointed guardian of the person and property of his minor brother Kedar Nath. The application was opposed by Sukhdeo Ram and Mahadeo Prasad, grandfather and father of Kedar Nath's wife, Musammat Janki.

The District Judge with the consent of the parties referred the matter to the arbitration of a gentleman of high social position, Kunwar Bharat Singh, and the arbitrator by his award dated the 4th March 1907 recommended that Bindeshri Prasad be appointed guardian of the person and property of Kedar Nath. In accordance with this award the District Judge on the 30th of April 1907 appointed Bindeshri to be the guardian of the person and

* First Appeal No. 71 of 1907 from an order of C. Rustomjee, District Judge of Allahabad, dated the 30th of April 1907.

(1) (1874) 7 Mad., H. C., Rep., 285.

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property of the minor. Mahadeo Prasad appealed to the High Court against this order, one of the grounds of appeal being that the District Judge had no power to refer the matter to arbitration and to accept the award.

Babu *Satya Chandra Mukerji* (for whom Lala *Kedar Nath*,) the appellant.

Dr. *Satish Chandra Banerji* (for whom Babu *Lalit Mohan Banerji*), for the respondent.

AIKMAN, J.—This is an appeal from an order of the learned District Judge of Allahabad appointing a guardian of the person and property of a minor named Kedar Nath under the provisions of the Guardians and Wards Act, 1890. The appellant is the father-in-law of the minor. The respondent, who was appointed guardian by the learned Judge, is the minor's elder brother. Each of the parties to this appeal claimed to be appointed guardian. It appears that on the joint application of the parties the question as to who should be appointed guardian was referred to the arbitration of Kunwar Bharat Singh, a gentleman against whom no imputation whatever is made. It appears from the order of the learned Judge that he decided the question as to who should be the guardian solely on the award of the arbitrator. In appeal here it is contended that under Act No. VIII of 1890 the District Judge was not competent to refer to an arbitrator the question as to who should be appointed guardian. In my opinion this contention must prevail. Some special Acts, for instance, the Act dealing with religious endowments, No. XX of 1863, empower a Court to refer matters in difference to arbitration. No such power is given in the Guardians and Wards Act, and it is easy to understand why this should be so. When there are rival claimants to be appointed as guardian these claimants are not in the position of ordinary litigants who can refer any matter in dispute between them to a tribunal selected by themselves. The guiding principle in appointing a guardian is the consideration of what is best for the welfare of the minor. In my opinion the intention of the law is that the question as to who is the best guardian of the minor's interests is one to be decided by the Court, and that a Court cannot delegate its functions to any arbitrator, however competent and above suspicion that arbitrator

may be. If rival claimants to a certificate of guardianship are allowed to refer the dispute between them to an arbitrator, a door would be open to collusion and the interests of minors might suffer. For these reasons I am of opinion that this appeal must be sustained.

KARAMAT HUSEIN, J.:—This is an appeal from an order passed by the learned District Judge of Allahabad under the Guardians and Wards Act (No. VIII of 1890). The facts are these:—One Bindeshri Prasad, the managing member of a joint Hindu family governed by the Mitakshara, applied to the District Judge of Allahabad under section 10 of the Guardians and Wards Act (No. VIII of 1890) to be appointed guardian of the person and property of his minor brother Kedar Nath. The application was opposed by Sukhdeo Ram and Mahadeo Prasad, grandfather and father of Kedar Nath's wife, Musammat Janki.

The learned District Judge with the consent of the parties referred the matter to arbitration, and the arbitrator by his award, dated the 4th March 1907 recommended that Bindeshri Prasad be appointed guardian of the person and property of Kedar Nath. In accordance with this award the learned District Judge on the 30th of April 1907 appointed Bindeshri to be the guardian of the person and property of the minor. Mahadeo Prasad appeals to this Court against this order. One of the grounds of appeal is that the learned District Judge had no power to refer the matter to arbitration and to accept the award.

This objection is in my opinion sound. The State is theoretically the guardian of all its minor subjects. As an old writer observes, "the law protects their persons, their rights and estates, excuseth their laches and assists them in their pleadings; the judges are their counsellors, the jury are their servants and the law is their guardian"—(Trevelyan on the law relating to minors, page 15). The State being the guardian of all minor subjects delegates by legislation its guardianship to such of its tribunals as it deems fit. In British India the guardianship of the person and property of minors has been given to District Courts, and they have been authorized to appoint guardians in certain specific ways. The law on the subject is now contained in the Guardians and Wards Act (No. VIII of 1890.) The course to be followed

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by the District Court in appointing or declaring a guardian is prescribed in sections 11 (1), 13, 17 and 46. Under section 13 it shall hear such evidence as may be adduced in support of or in opposition to the application. Under section 17 it shall be guided by what . . . . . appears . . . . . to be for the welfare of the minor. Section 46 allows the District Court to call upon the Collector or upon any Court subordinate to it for a report on any matter arising in any proceeding under the Act and treat the report as evidence.

Such are the powers given by the Act to a District Court for the purpose of appointing or declaring a guardian of the person or the property of a minor. There is nothing in the Act to authorize a District Court to refer the question of the appointment or declaration of a guardian to arbitration. The learned District Judge had, therefore, no power to refer that matter to arbitration.

It might be contended that section 647 of the Code of Civil Procedure empowered the learned District Judge to make such reference, but there is no force in this contention. The section in my opinion deals with procedure, and procedure alone, and does not touch the substantive law of arbitration. The reference by the learned District Judge in the case before me was no doubt made with the consent of the parties, but that would give him no power. Besides, a party is allowed by law to submit any dispute regarding any right of his own to arbitration, but the question of guardianship stands upon a different footing and is not one of the private civil rights of any private person.

For the above reasons I hold that the course adopted by the learned District Judge was contrary to law and I therefore set aside his order and remand the case under section 562 of the Code of Civil Procedure with directions to readmit the application under its original number in the register and proceed to determine it in accordance with law.

BY THE COURT.—The appeal is allowed, the order of the learned District Judge is set aside, and the case is remanded to his Court with directions to readmit the application under its original number in the register and proceed to determine it according to law. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

1908
January 28.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

MAKUND RAO (OBJECTOR) *v.* JANKI BAI AND ANOTHER (DECREE-HOLDER).*

Act (Local) No. I of 1903 *(Bundelkhand Encumbered Estates Act), sections* 2 *and* 12*—Joint decree—Execution of decree—Effect of some out of several joint judgment-debtors taking advantage of the Act.*

Five out of six joint judgment-debtors took the benefit of the Bundelkhand Encumbered Estates Act, 1903. A notification was issued under the Act, but the decree-holders did not make any claim within the time prescribed. *Held* that the decree-holders could not recover from the judgment-debtor who had not taken advantage of the Act anything more than his proportionate share of the judgment debt.

THE facts of this case are as follows:—

On the 9th of June 1893 Musammat Janki Bai and Musammat Lachmi Bai obtained a decree against six persons, namely, Atma Ram, Sita Ram, Balkishen, Raghunath, Krishan and Madho Rao. The decree was for a sum of Rs. 5,091-9-0 with interest and costs. After this decree was passed, all the judgment-debtors with the exception of Madho Rao took the benefit of the Bundelkhand Encumbered Estates Act, 1903. A notification was issued calling upon creditors to submit their claims. The decree-holders put in their claim against the applicants, but they did not come in within the time required by the Act, and their claim was rejected. The decree-holders then applied for execution of their decree against the son of Madho Rao, and sought to execute the whole decree against him. The judgment-debtor objected that under the circumstances he was only liable for his proportionate share of the decretal amount. This plea was, however, rejected, and the first Court ordered execution to proceed against Makund Rao for the whole amount. Makund Rao thereupon appealed to the High Court.

Babu *Durga Charan Banerji*, for the appellant.

The Hon'ble Pandit *Madan Mohan Malaviya* and Munshi *Iswar Saran*, for the respondents.

AIKMAN and KARAMAT HUSEIN, JJ.—This appeal arises out of an application to execute a decree, dated the 9th of June 1893, which was passed in favour of the respondents Musammat Janki Bai and Musammat Lachmi Bai against six persons, namely, Atma Ram, Sita Ram, Bal Kishen, Raghunath, Krishan and Madho Rao. The appellant here is the son of the last-named

* First Appeal No. 134 of 1906, from a decree of Parmatha Nath Banerji, Subordinate Judge of Jhansi, dated the 17th of February 1906.

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judgment-debtor. The decree was for the sum of Rs. 5,091-9-0 and for costs and interest. It appears that all the judgment-debtors save Madho Rao took the benefit of the Bundelkhand Encumbered Estates Act, 1903. The usual notification was issued calling upon creditors to submit their claims. The respondents decree-holders put in their claim against the applicants, but, unfortunately for themselves, they did not put forward their claim within the time required by the Act, and the Special Judge refused to consider it. Now there is in the Act a very stringent provision to be found in section 12, which runs as follows:—"Every claim against the proprietor in respect of a private debt shall, unless made within the time and in the manner required by this Act, be deemed for all purposes and on all occasions to have been duly discharged." That the judgment debt is a private debt within the definition of section 2 of the Act does not admit of any doubt. It follows from the provisions of section 12 that, so far as the liability of the five judgment-debtors who took advantage of the Act is concerned, the decretal debt must be deemed to have been duly discharged. As the respondents decree-holders could not proceed against the other judgment-debtors, they seek now to recover from the appellant the whole of the judgment-debt. The appellant took objection in the Court below that under the circumstances he was only liable for his proportionate share of the decretal amount. This objection was overruled by the learned Subordinate Judge who held that the decree being a joint one each judgment-debtor is liable for the whole of it. This is no doubt true, but we are of opinion that the learned Subordinate Judge did not give due effect to the terms of section 12 of Local Act No. I of 1903 quoted above. No doubt when a joint decree is passed against several judgment-debtors the decree may be executed against any one of these judgment-debtors, and if one of them satisfies the whole of the decree he would have his remedy by taking proper steps to enforce a right of contribution against his co-judgment-debtors. But even a joint decree can only be executed for such part of the decretal debt as has not been discharged. In our opinion the effect of section 12 of the Encumbered Estates Act is to discharge the decree to the extent of the joint liability of

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the five judgment-debtors who took advantage of the Act. It appears to us that the respondents cannot treat the provisions of this section as a nullity and seek to enforce a judgment debt which has by the provisions of the law been *pro tanto* duly discharged. If the appellant had to satisfy the whole of the debt, we are of opinion he could not enforce any right of contribution against his co-judgment-debtors, as they could rely on the terms of the Act and plead in answer to a suit for contribution that their share of the judgment debt must be deemed for all purposes to have been discharged. This result would be owing, not to any fault on the part of the appellant, but to the laches of the respondents in not having put forward their claim before the Special Judge within the time allowed by law. We think, therefore, that the order of the Court below disallowing the appellant's objection was wrong. We allow the appeal, and, setting aside the order of the Court below, remand the case to that Court with directions to proceed with the execution on the basis that the appellant is not liable for the whole of the judgment-debt but only for his proportionate share thereof. The appellant will recover from the respondent $\frac{1}{12}$ of the costs incurred by him in this Court. The respondents will recover from the appellant $\frac{1}{12}$ of the costs incurred by them in this Court. The costs in the Court below will abide the result.

Appeal decreed.

1908

January 29.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

FIROZI BEGAM (PLAINTIFF) *v.* ABDUL LATIF KHAN AND ANOTHER (DEFENDANT).*

Civil Procedure Code, section 549—Security for costs—Non-compliance with order for security—Appeal rejected—Application to restore appeal—Application refused.

Held that no appeal will lie from an order refusing to readmit an appeal which had been rejected under section 549 of the Code of Civil Procedure on account of non-compliance with an order to furnish security for costs. *Lekha* v. *Bhauna* (1) followed. *Kuar Balwant Singh* v. *Kuar Doulut Singh* (2) distinguished.

IN this case one Musammat Firozi Begam, a lady residing in the Rampur State, instituted a suit in the Court of the

* First Appeal No. 24 of 1907, from an order of D. R. Lyle, District Judge of Moradabad, dated the 16th of February 1907.

(1) (1895) I. L. R., 18 All., 101. (2) (1886) L. R., 13 I. A., 57.

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Subordinate Judge of Moradabad to recover a sum of money on account of her dower. The suit was based upon a judgment which the plaintiff had obtained from a Court in Rampur against her husband Abdul Latif Khan. The suit was dismissed. The plaintiff appealed. On the 3rd of November 1906, on an application by the respondent, the appellant was ordered to find security for costs under the provisions of section 549 of the Code of Civil Procedure, and the 15th of December 1906 was fixed as the time within which the security was to be furnished. The security was not furnished within time. On the 19th of December the appellant applied for extension of time, but her application was not allowed, and on the following day the appeal was rejected under the provisions of section 549. On the 15th of February 1907 the appellant again applied to the Court asking that the security might be accepted and the appeal restored to the file. This application also was rejected. The appellant appealed to the High Court against the order of the Subordinate Judge rejecting her application for readmission of her appeal in the Court below.

Mr. *Abdul Majid* and Maulvi *Muhammad Ishaq*, for the appellant.

Dr. *Tej Bahadur Sapru*, for the respondents.

AIKMAN and KARAMAT HUSEIN, JJ.—The appellant is a lady residing in the Rampur State, that is, out of British India. She brought a suit in the Court of Subordinate Judge of Moradabad to recover a sum of money on account of her dower. The suit was based on a judgment which she had obtained from a Court in Rampur against her husband, the respondent Abdul Latif Khan. Her suit was dismissed. She appealed. On the application of the respondent, she was on the 3rd of November 1906 ordered by the appellate Court to furnish security for costs under the provisions of section 549 of the Code of Civil Procedure. The 15th of December 1906 was the time fixed within which the security had to be furnished. The appellant did not furnish the security within that time. On the 19th of December 1906, she asked for an extension of time within which to file the security. Although the time had expired, the learned Judge had authority to extend the time, *vide* decision of the Privy Council in *Budri*

Narain v. *Mussummat Sheo Koer* (1). Unfortunately for the appellant the learned Judge refused to extend the time. He sets out in his order of the 19th December 1906 that the appellant had been allowed six weeks within which to furnish the security. This he considered ample time, and he remarks that no attempt was made to have that time extended, meaning clearly, no attempt within the time allowed. He adds:—"I see no sufficient reason for allowing this application or for extending the time allowed and consequently refuse the application." On the following day he rejected the appeal under the provisions of section 549 of the Code of Civil Procedure. On the 15th February the appellant presented another petition asking to be allowed to deposit security and that the appeal might be restored to its original number. In support of her application she relied on a decision of the Privy Council in *Kuar Balwant Singh* v. *Kuar Doulut Singh* (2). The learned Judge held that that case was very different from the one with which he had to deal and refused to restore the appeal. It is against that order that the present appeal has been preferred. For the respondents a preliminary objection is raised that no appeal lies. It is noticeable that there is no provision in the Code similar to that contained in the second paragraph of section 381 which allows a plaintiff, whose suit has been dismissed for failure to furnish security for costs, to apply for an order to set the dismissal aside. Nor can we find in the Code any right of appeal given from an order refusing to readmit an appeal under the circumstances set forth above. In reply to the preliminary objection the learned vakil for the appellant relies on the Privy Council decision cited above. The facts of that case were of a peculiar nature and in our opinion the learned Judge is right in holding that it is distinguishable from the present case. We are compelled therefore to sustain the preliminary objection. At the same time we take the opportunity of expressing our opinion that, considering the serious consequences entailed by an order under section 549, it would be well if the Legislature should consider whether it is not advisable to embody in the new Code of Civil Procedure some provision analogous to that contained in the second paragraph of section 381 and to

(1) (1889) L. R., 17 I. A., 1. (2) (1886) L. R., 13 I. A., 57.

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give a right of appeal from orders passed under section 549. But as the law at present stands we can find no provision in it under which this appeal can be brought. We may mention that a Full Bench of this Court has held in *Lekha* v. *Bhauna* (1) that an order rejecting an appeal under section 549 is not appealable either as an order or as a decree. The case may be a hard one, but under the circumstances we have no alternative but to sustain the respondent's preliminary objection and dismiss the appeal, which we hereby do. Under the circumstances of the case we make no order as to costs.

Appeal dismissed.

1908
January 29.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

KISHAN LAL (DECREE-HOLDER) *v.* UMRAO SINGH (JUDGMENT-DEBTOR).*

Act No. IV of 1882 *(Transfer of Property Act), section* 99— *Civil Procedure Code, section* 316—*Mortgage—Simple money decree accepted by mortgagee—Sale of mortgaged property in execution of such decree.*

Even though the mortgagee disclaims all interest in his mortgage and asks for and obtains a simple money decree he is precluded by section 99 of the Transfer of Property Act, 1882, from bringing the mortgaged property to sale in execution of the simple money decree. *Madho Prasad Singh* v. *Baijnath* (2) followed. But if such a sale does in fact take place and is confirmed and a certificate is granted to the auction purchaser the sale cannot afterwards be impeached upon the ground that it was in violation of section 99 of the Transfer of Property Act. *Madan Makund Lal* v. *Jamna Kaulapuri* (3), *Raj Kishore De Sarkar* v. *Dina Nath Chandra* (4), *Thaleri Pathumma* v. *Thandora Mammad* (5), *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (6) and *Umed* v. *Jas Ram* (7) referred to. *Sonu Singh* v. *Bihari Singh* (8) dissented from.

THE facts of this case are as follows :—

One Umrao Singh on the 13th of November 1895 mortgaged certain property to one Kishan Lal. The mortgagee brought a suit against the mortgagor. In that suit he abandoned his rights under the mortgage and obtained a simple money decree on the 25th of March 1901. This decree he assigned to another Kishan Lal, who applied on the 22nd of November 1902 for attachment

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* First Appeal No. 22 of 1907, from an order of K. M. Ghosh, Additional District Judge of Aligarh, dated the 17th of January 1907.

(1) (1895) I. L. R., 18 All., 101.
(2) Weekly Notes, 1905, p. 152.
(3) Weekly Notes, 1907, p. 48.
(4) (1908) 12 C. W. N., lx.
(5) (1899) 10 M. L. J., 110.
(6) (1899) I. L. R., 26 Calc., 727.
(7) (1907) I. L. R., 29 All., 612.
(8) (1905) I. L. R., 33 Calc., 283.

and sale of the property which had been mortgaged to his assignor. The property was attached and a proclamation of sale issued under section 287 of the Code of Civil Procedure. On the 18th of April 1903 the judgment-debtor asked for postponement of the sale in order that he might raise the amount of the decree. This application was refused. On the 20th of July 1903 the property was sold and purchased by the assignee of the decree. On the 19th of August 1903 the respondent judgment-debtor applied under section 311 of the Code of Civil Procedure to have the sale set aside. On the 12th of September 1903 this application was rejected, and on the 22nd of that month the sale was confirmed. It appears from the record that a sale certificate was granted to the assignee of the decree, who is now in possession. On the 6th of June 1906, nearly three years after the sale, the judgment-debtor applied to the Court to set aside the sale on the ground of its having been held in contravention of the provisions of section 99 of the Transfer of Property Act. The Court of first instance (Munsif of Kasganj), disallowed this application on the ground that it was too late. On appeal by the judgment-debtor the lower appellate Court (Additional District Judge of Aligarh) reversed the decision of the Munsif and remanded the case to the Court of first instance under section 562 of the Code of Civil Procedure for decision on the merits. Against this order the decree-holder appealed to the High Court.

Dr. *Satish Chandra Banerji* (for whom Babu *Sarat Chandra Chaudhri*), and *Gulzari Lal*, for the appellant.

Dr. *Tej Bahadur Sapru*, for the respondent.

AIKMAN and KARAMAT HUSEIN, JJ.—This is an appeal from an order of remand made by the learned Additional Judge of Aligarh in execution proceedings. The respondent Umrao Singh on the 13th of November 1895 mortgaged certain property to one Kishan Lal. The mortgagee brought a suit against the respondent. In that suit he abandoned his rights under the mortgage and obtained a simple money decree on the 25th of March 1901. This decree he assigned to the present appellant, who applied on the 22nd of November 1902 for attachment and sale of the property which had been mortgaged to his assignor. The property was attached and a proclamation of sale issued under section

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287 of the Code of Civil Procedure. On the 18th of April 1903 the judgment-debtor asked for postponement of the sale in order that he might raise the amount of the decree. This application was refused. On the 20th of July 1903 the property was sold and purchased by the present appellant. On the 19th of August 1903 the respondent judgment-debtor applied under section 311 of the Code of Civil Procedure to have the sale set aside. On the 12th of September 1903 this application was rejected, and on the 22nd of that month the sale was confirmed. It appears from the record that a sale certificate was granted to the appellant, who is now in possession. On the 6th of June 1906, nearly three years after the sale, the judgment-debtor applied to the Court to set aside the sale on the ground of its having been held in contravention of the provisions of section 99 of the Transfer of Property Act. The Court of first instance disallowed this application on the ground that it was too late. On appeal by the judgment-debtor the lower appellate Court reversed the decision of the Munsif and remanded the case to the Court of first instance under section 562 of the Code of Civil Procedure for decision on the merits. We may remark here that we see no reason whatever why the Court below should have sent back the case, as by its decision the only question between the parties had been determined. The appeal here has been very ably argued by the learned gentlemen who appear for the parties. They have cited a large number of authorities. It has been held by this Court in *Madho Prasad Singh* v. *Baijnath* (1) that, even though the mortgagee disclaims all interest in his mortgage and asks for and obtains a simple money decree, he is precluded by section 99 of the Transfer of Property Act from bringing that property to sale in execution of the simple money decree. Having regard to that ruling it must be held therefore that the Court was not justified in ordering the sale of the property. But the fact remains that it did order the property to be sold; that the sale took place and was confirmed, and that a certificate was granted to the auction purchaser, which, by the operation of section 316 of the Code of Civil Procedure, so far as the parties to the suit and the persons claiming through or under them, vests in the purchaser the title to the property sold. What

(1) Weekly Notes, 1905, p. 152.

we have to decide is whether the order for sale having been passed to the knowledge of the judgment-debtor, and having been allowed by him to become final, he can now at this late stage have the sale set aside and the purchaser divested of his title on the ground that the Court ought not to have ordered the property to be sold. In our opinion the decision of the Court of first instance on this question is right. In the case *Madan Makund Lal* v. *Jamna Kaulapuri* (1) the learned Judges remark in regard to a somewhat similar case :—" The plaintiff relied on the provisions of section 99 of the Transfer of Property Act. No doubt the sale was held in violation of the provisions of that section, but it was the duty of the judgment-debtors, whom the plaintiff now represents, to object to the sale or to the confirmation of the sale before the sale was confirmed. After the sale had been confirmed, as between the judgment-debtors and the auction-purchasers, the title of the latter has become complete and it is no longer open to the plaintiff, who stands in the shoes of the judgment-debtors, to question the title of the defendant on the ground that the sale at which they purchased was not authorized by law." It is true that that was a case of a suit, while this was an application under section 244 of the Code of Civil Procedure, but we do not think that this circumstance affects the principle laid down in the passage just cited. The decision in *Raj Kishore De Sarkar* v. *Dina Nath Chandra* (2) is also in favour of the appellant. In the case *Thaleri Pathumma* v. *Thandora Mammad* (3) it was held by Shephard and Benson, JJ., that, when an order for sale of a mortgaged property in execution of a money decree of the mortgagee was obtained after notice to the mortgagor and the property was sold in pursuance of such order, the mortgagor cannot go behind the order and seek to set aside the sale on the ground that it ought not to have been passed by reason of section 99 of the Transfer of Property Act. In the case of *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (4) a judgment-debtor whose occupancy holding had been sold in execution of a decree for rent objected to the application made by the auction purchaser after the confirmation of sale for delivery of possession

(1) Weekly Notes 1907, p. 48.
(2) (1908) 12 C. W. N., lx.
(3) (1899) 10 M. L. J., 110.
(4) (1899) I. L. R., 26 Calc., 727.

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on the ground that the sale was illegal. The learned Judges who decided that case, Ghose and Banerji, JJ., observe at page 732 of the judgment:—"An order for sale was made and in furtherance of that order the property was sold, whatever may be the effect of that sale. If the judgment-debtors were parties to that order, or were aware of it, and did not appeal against it, they are now precluded from questioning the propriety of that order and consequently of the sale that has taken place under that order." The decision by one of us in *Umed* v. *Jas Ram* (1) is also in favour of the appellant. In the case of *Sonu Singh* v. *Bihari Singh* (2) the learned Judges say:—"As regards the mortgagor raising no objection before the sale, it must be observed that no duty was imposed upon him to do so, it being the decree-holder alone who was responsible for the particulars to be entered in the sale proclamation." It appears that in that case the application to set aside the sale was made before confirmation, though this circumstance is not referred to in the judgment. The observation just cited is opposed to the authorities to which we have referred above, and with all deference to the learned Judges we are unable to accept the view expressed by them. We entirely disagree with the view expressed by the learned Additional Judge in this case that the respondent could not object until the sale had actually taken place. The learned Additional Judge is also wrong in saying that no specification of the property was given in the proclamation for sale. That document sufficiently defines the property which the decree-holder wished to sell, and if there was any irregularity in publishing the sale, that was a matter to be dealt with under section 311 of the Code of Civil Procedure. Following the authorities cited in the earlier part of this judgment, we are of opinion that this appeal must succeed. We set aside the order of the Court below and restore that of the Court of first instance. The appellant will have his costs here and in the lower appellate Court.

Appeal decreed.

(1) (1907) I. L. R., 29 All., 621. (2) (1905) I. L. R., 33 Calc., 283.

Before Mr. Justice Banerji and Mr. Justice Richards.

1908
February 3.

BAHADUR SINGH (OPPOSITE PARTY) *v.* NEGI PURAN SINGH, APPLICANT).*

Civil Procedure Code, sections 522, 525—*Private arbitration—Award made a rule of Court—Appeal.*

When an award made in a private arbitration has been made a rule of Court and a decree passed thereon, no appeal will lie except so far as the decree is in excess of or not in accordance with the award. In this respect there is no difference between a decree based upon a private award and a decree based upon an award made through the intervention of the Court. *Mustafa Khan* v. *Phulja Bibi* (1) distinguished.

THIS was an application under section 525 of the Code of Civil Procedure to have an award made a rule of Court. On the 25th of January 1904 the parties had referred the matters in dispute between them to arbitration without the intervention of a Court, and on the 20th of October 1904 the arbitrator made his award. The opposite party raised certain objections to the filing of the award, which were, however, overruled, and the Court (Subordinate Judge of Dehra Dun) ordered the award to be filed and passed a decree in accordance therewith. From this decree the opposite party appealed to the High Court.

Babu *Sital Prasad Ghosh*, for the appellant.

The Hon'ble Pandit *Sundar Lal*, for the respondent.

BANERJI and RICHARDS, JJ.—This appeal arises out of a suit brought under the provisions of section 525 of the Code of Civil Procedure for the filing of an award made by an arbitrator appointed without the intervention of a Court. The parties referred their disputes to the arbitration of an arbitrator on the 25th of January 1904. The arbitrator made his award on the 20th of October 1904. Objections were raised on behalf of the appellant in regard to the award, which were overruled, and the Court ordered the award to be filed and made a decree in accordance with it. From this decree the present appeal has been preferred. A preliminary objection is taken on behalf of the respondent to the effect that no appeal lies. In our judgment this objection must prevail. Section 526 of the Code of Civil Procedure provides that if no ground such as is mentioned or referred to in section 520 or section 521 be shown against the award, the

* First Appeal No. 276 of 1905, from a decree of S. P. O'Donnell, Subordinate Judge of Dehra Dun, dated the 25th of July 1905.

(1) (1905) I. L. R, 27 All., 526.

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Court shall order it to be filed, and such award shall take effect as an award made under the provisions of Chapter XXXVII. As soon, therefore, as the Court orders an award to be filed the provisions of section 522 become applicable. One of those provisions is that on a judgment being given by the Court a decree shall follow, and no appeal shall lie from such a decree except in so far as the decree is in excess of or not in accordance with the award. It is admitted that the decree in the present case is not in excess of the award It is further admitted that if the decree in the present case had been a decree in a suit which the parties had referred to arbitration through the intervention of the Court no appeal would have lain. But it is contended that there is a difference between such a case and a case in which a reference is made without the intervention of a Court. We fail to see that any such distinction exists. As we have said above, according to the provisions of section 526 when a Court orders an award to be filed, section 522 must apply, that is to say, a decree must be made on judgment being pronounced by the Court; so that if this decree be not in excess of the award or does not vary the award no appeal would lie. We have been referred by the learned vakil for the appellant to the case of *Mustafa Khan* v. *Phulja Bibi* (1). In that case a Bench of this Court entertained an appeal under similar circumstances, but the question whether an appeal lay or not does not appear to have been raised, and it certainly was not decided. We are therefore unable to regard that case as an authority for the contention that in the case of a private arbitration when a decree is made by a Court in accordance with the award an appeal lies. We accordingly allow the objection, and holding that no appeal lies dismiss the appeal with costs. The objection preferred under section 561 of the Code of Civil Procedure necessarily fails. We dismiss it.

Appeal dismissed.

(1) (1905) I. L. R., 27 All., 526.